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Recommended Citation

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Reorienting Disclosure Debates in a Post-Citizens United World

Katherine Shaw*

I. INTRODUCTION

Disclosure is often an afterthought in debates about money in politics. Reformers have tended to take disclosure for granted, devoting little time to developing and refining the affirmative case for it. They have also tended to assume that the current disclosure regime is an effective one, at least as far as it goes. Reformers *have* devoted substantial attention to the holes in the current regime in the post-*Citizens United* era—so-called “dark” and “gray” money¹—and have considered ways to bring such activity into the light. Yet even if they are successful, such expansion efforts would only bring more dollars under the auspices of a disclosure regime in need of both stronger conceptual architecture and substantial practical improvements. So closing the gaps in the system is only one aspect of the task.

Consistent with the mission of this volume, this chapter will first survey the doctrine, practice, and empirics of disclosure. It will then turn to a number of proposals for reforming the reach, quality, and impact of this mode of campaign finance regulation.²

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¹ CHISUN LEE, KATHERINE VALDE, BENJAMIN T. BRICKNER & DOUGLAS KEITH, BRENNAN CENTER FOR JUSTICE, SECRET SPENDING IN THE STATES 5 (Sept. 2016), www.brennancenter.org/sites/default/files/analysis/Secret_Spending_in_the_States.pdf (defining dark money as “election spending by entities that do not publicly disclose their donors,” and “gray money” as spending “by entities that disclose donors in a way that makes the original sources of money difficult or perhaps impossible to identify.”).

² Many of these proposals are drawn from my previous work with sociologist Jennifer Heerwig. Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1449 (2014).

II. THE DOCTRINE AND PRACTICE OF DISCLOSURE

A. Doctrine

“Campaign finance disclosure” generally refers to laws that require both reporting and public dissemination of information about political actors’ fundraising and spending. The term can be further divided into a few distinct but related activities: the *reporting* of information about contributions and expenditures; the public *dissemination* of that information; and *disclaimers*, which provide the public with information about the sponsors of particular political messages (“e.g., paid for by the ABC Committee.”)³

Mandatory disclosure has long been a feature of our law of campaign finance. The Supreme Court’s analytical framework for disclosure is traceable, like much in the law of campaign finance, to *Buckley v. Valeo*,⁴ the Court’s foundational consideration of the constitutionality of the Federal Election Campaign Act (FECA).⁵

In addition to upholding FECA’s contribution limits and invalidating the law’s expenditure limits, the *Buckley* Court upheld FECA’s disclosure requirements in full (though subject to several important limiting principles).⁶ The relevant provisions of law required “political committees”⁷ to register with the Federal Election Commission (FEC), and to keep records of expenditures and contributions.⁸ The law also required candidates and political committees to provide the FEC with detailed reports, which the FEC would then make available “for public inspection and copying.”⁹ Beyond its candidate and political committee provisions, the law required *all* individuals or groups that made independent expenditures above a certain amount “for the purpose

³ Heerwig & Shaw, *supra* note 2, at 1449; Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, The Dark Election of 2010 and Why Tax-Exempt Entities Should be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 CHAP. J.L. & POL’Y 59, 79 (2010–2011).

⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁵ Federal Election Campaign Act (FECA) of 1971, Pub. L. No. 92–225, 86 Stat. 3 (1972), *amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93–443, 88 Stat. 1263 (codified as amended at 2 U.S.C. § 431 (1974)).

⁶ *Buckley*, 424 U.S. at 63–64.

⁷ When *Buckley* was decided, FECA defined a political committee as “a group of persons that receives ‘contributions’ or makes ‘expenditures’ of over \$1,000 in a calendar year ... ‘for the purpose of ... influencing’ the nomination or election of any person to federal office.” *Id.* at 62–63 (citing 2 U.S.C. § 432 (Supp. IV 1970)).

⁸ *Id.* at 63 (citing 2 U.S.C. § 432 (Supp. IV 1970)).

⁹ *Id.*

of ... influencing the ... election, of any person to Federal office” to file a statement with the FEC.¹⁰

The *Buckley* Court began its discussion with an acknowledgment that mandatory disclosure “can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”¹¹ This meant that disclosure requirements could not be justified “by a mere showing of some legitimate governmental interest,”¹² but would have to survive “exacting scrutiny,” which required both a sufficiently important government interest and a substantial relationship between the governmental interest and the disclosure requirement.¹³ The Court then identified three governmental interests that, taken together, *did* satisfy the “exacting scrutiny” the Constitution required.¹⁴ The first has come to be known as the “informational” interest:

[D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate’s financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.¹⁵

Next, the Court explained that disclosure furthered an important interest in preventing both corruption and the appearance of corruption, reasoning that “exposing large contributions and expenditures to the light of publicity” was likely to “discourage those who would use money for improper purposes either before or after the election,”¹⁶ as well as to equip the public to detect “any post-election special favors that may be given in return.”¹⁷

Finally, the Court concluded that disclosure was justified by an “enforcement interest”—that is, that the law’s “recordkeeping, reporting, and

¹⁰ *Id.* at 145 (citing 52 U.S.C. § 30101, formerly § 434(e)); *accord Buckley*, 424 U.S. at 63–64.

¹¹ *Id.* at 64. To underscore the significance of this interest, the Court pointed to cases like *NAACP v. Alabama*, 357 U.S. 449, 466 (1964) (holding that Alabama could not compel the state chapter of the NAACP to disclose the names of its staff and members), and *Bates v. Little Rock*, 361 U.S. 516, 527 (1960) (holding that the City of Little Rock could not demand lists of NAACP members and staff).

¹² *Buckley*, 424 U.S. at 64.

¹³ *Id.* (internal quotation marks omitted).

¹⁴ *Id.* at 64–66.

¹⁵ *Id.* at 66–67 (internal quotation marks omitted).

¹⁶ *Id.* at 67.

¹⁷ *Id.*

disclosure requirements” were necessary to police compliance with FECA’s other provisions.¹⁸

The Court found these interests “sufficiently important to outweigh the possibility of infringement [of First Amendment rights], particularly when the ‘free functioning of our national institutions’ is involved.”¹⁹ But it left the door open to future as-applied challenges, where there was a demonstrated “reasonable probability” that disclosure would result in “threats, harassment, or reprisals.”²⁰

In addition to affirming the availability of as-applied challenges, the Court limited the sweep of disclosure requirements in two ways. First, it limited the definition of *political committee* to organizations whose “major purpose ... is the nomination or election of a candidate.”²¹ This meant, among other things, that only such entities were subject to the law’s committee disclosure requirements. And second, it narrowed the independent-organization disclosure requirements to “contributions earmarked for political purposes or authorized or requested by a candidate or his agent,” and “expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.”²²

The Court cited disclosure requirements in generally approving terms in a number of post-*Buckley* cases.²³ But it was not until the 2003 case *McConnell*

¹⁸ *Id.* at 67–68.

¹⁹ *Id.* at 66 (quoting *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961).

²⁰ *Id.* at 74. This discussion occurred primarily in the context of the Court’s evaluation of the argument that a blanket exemption to the disclosure requirements was warranted for independent and third-party candidates, but its general interest-balancing analysis has been understood to apply more broadly. *See id.* at 72–74. In *Brown v. Socialist Workers ’74 Campaign Committee*, 459 U.S. 87, 102 (1982), the Court found that the Socialist Workers Party was entitled to such an exemption from Ohio’s campaign finance disclosure law.

²¹ *Buckley*, 424 U.S. at 79.

²² *Id.* at 80. The Court tied this limiting definition to an earlier definition of “express advocacy” as involving “express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Id.* at 44 n. 52.

²³ *See, e.g.*, *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 223 (1999) (O’Connor, J., concurring in part and dissenting in part) (“[T]otal disclosure has been recognized as the essential cornerstone to effective campaign finance reform and fundamental to the political system.”) (internal quotation marks and citations omitted); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) (invalidating FECA’s independent corporate expenditure limitations as applied to a nonprofit ideological corporation, but also citing with approval the disclosure provisions that continued to apply to the plaintiff group, and noting that “[t]hese reporting obligations provide precisely the information necessary to monitor MCFL’s independent spending activity and its receipt of contributions”); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791–92 & n. 32 (1978) (invalidating Massachusetts’s limitations on corporate spending on ballot initiatives, and remarking that “the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments,”

v. Federal Election Commission that it again addressed disclosure in depth.²⁴ The *McConnell* Court split 5-4 on the constitutionality of many of the substantive provisions of the 2002 Bipartisan Campaign Reform Act (BCRA).²⁵ But the Court was nearly unanimous in upholding the law's expanded disclosure requirements.²⁶ The Court explained that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to [the disclosure requirements created by] BCRA."²⁷

In three cases in the last eight years, the Court has again reaffirmed the constitutionality of broad disclosure requirements. In *Citizens United v. Federal Election Commission*, which began as a case largely about disclosure, eight Justices resoundingly upheld the constitutionality of BCRA's expanded disclosure requirements, finding those requirements plainly justified by the "informational interest" in disclosure. (Because the Court credited this interest, it found no need even to discuss the other government interests that might be implicated.) Justice Anthony Kennedy wrote that "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."²⁸

Though disclosure was not directly at issue in *McCutcheon v. Federal Election Commission*, in which the Court considered the constitutionality of the aggregate limits on contributions to candidates and committees, the Court in that case went out of its way to reaffirm that "[d]isclosure of contributions minimizes the potential for abuse of the campaign finance system ...

and that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected").

²⁴ 540 U.S. 93 (2003).

²⁵ Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified at (codified at 52 U.S.C. § 30101, formerly 2 U.S.C. § 431 (2002)), *invalidated in part by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

²⁶ See *McConnell*, 540 U.S. at 190-92 (opinion of Justices Stevens and O'Connor, joined by Justices Souter and Ginsburg) (rejecting challenge to BCRA's expanded disclosure requirements), *id.* at 231 (opinion of Rehnquist, C.J., joined in relevant part by all Justices but Thomas) (BCRA's disclosure provisions bear "a sufficient relationship" to the important governmental interest of "'shed[ding] the light of publicity' on campaign financing") (internal quotations omitted).

²⁷ 540 U.S. at 196.

²⁸ *Citizens United*, 558 U.S. at 370 (citations and internal quotations omitted).

disclosure ... offers a particularly effective means of arming the voting public with information.”²⁹

Doe v. Reed, though not a campaign finance case, represents the Court’s last major foray into disclosure in recent years.³⁰ *Doe* involved a referendum petition to put to a popular vote a state same-sex domestic partner benefits bill. Following the signature drive, a number of groups sought access to the referendum petitions under the state’s public records law. Both the sponsor and certain petition signatories brought a First Amendment challenge to the public-records law. Construing the case as a facial challenge, the Court held that the law, though it did implicate First Amendment interests, was justified by the government’s compelling interest in “preserving the integrity of the electoral process.”³¹ Justice Antonin Scalia concurred separately, setting forth the view, not by its logic limited to the referendum signature context, that “[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”³²

As this discussion makes clear, a strong majority of the Court has struck a remarkably pro-disclosure note in a number of cases, including in recent years, making disclosure a noteworthy exception to the strongly deregulatory arc of the Roberts Court in campaign finance regulation more broadly.³³ And both state and lower federal courts have followed the Supreme Court’s lead, for the most part rejecting challenges to disclosure requirements. But, importantly, in *all* of the campaign finance cases discussed above, disclosure challenges have come before the Court paired with challenges to other, more substantive forms of campaign finance regulation; perhaps for that reason, the Court’s disclosure discussions have generally been fairly cursory, often without particularly developed reasoning.³⁴ This means that the constitutional politics of disclosure may be less stable than the excerpts above suggest.³⁵

B. Practice

The preceding section walked through the Supreme Court’s major encounters with disclosure. But there is a sizable gulf between the Court’s rhetoric when

²⁹ *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

³⁰ 561 U.S. 186 (2010).

³¹ *Id.* at 197.

³² *Id.* at 228 (Scalia, J., concurring).

³³ Richard L. Hasen, *Election Law’s Path in the Roberts Court’s First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597, 1604–05 (2016).

³⁴ Katherine Shaw, *Taking Disclosure Seriously*, YALE J.L. & POL’Y INTER ALIA 18, 19 (2016).

³⁵ *Id.*

it comes to disclosure, and the on-the-ground reality of our disclosure system. Accordingly, this part provides a (necessarily abbreviated) overview of the current practice of disclosure, highlighting the ways in which current practice fails to align with the Court's rhetoric.³⁶

1. Dark Money and Gray Money

First, much of the money that flows through American elections today is either not subject to public disclosure at all ("dark money"), or is disclosed in a way that obscures the true sources of election spending ("gray money").³⁷

For the most part, the term "dark money" refers to money spent on elections by social welfare groups organized under section 501(c)(4) of the Internal Revenue Code (and to a lesser extent other exempt organizations organized under sections 501(c)(5) and 501(c)(6) of the Code—I refer to all of these as "social welfare" organizations throughout). Such organizations are tax exempt, but, unlike section 501(c)(3) organizations, they are not prohibited from engaging in political activity.³⁸ Rather, the IRS has advised that a social welfare organization may engage in political activity "so long as that is not its primary activity."³⁹ Many such organizations have interpreted this guidance to mean that "as long as expenditures on these activities do not exceed fifty percent of the organization's expenditures ... anything goes ... regardless of the nature of the political activities and whether they are in furtherance of the organization's social welfare purposes."⁴⁰ And, though such entities must report their expenditures on an IRS Form 990 as part of

³⁶ The picture painted in this section is primarily of the federal system; space limitations preclude any real consideration of the practice in the states.

³⁷ LEE ET AL., *supra* note 1, at 5.

³⁸ Rev. Rul. 81-95, 1981-1 C.B. 332 ("In order to qualify for exemption under section 501(c)(4) of the Code, an organization must be primarily engaged in activities that promote social welfare. Although the promotion of social welfare within the meaning of section 1.501(c)(4)-1 of the regulations does not include political campaign activities, the regulations do not impose a complete ban on such activities for section 501(c)(4) organizations. Thus, an organization may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is primarily engaged in activities that promote social welfare"; see also *Social Welfare Organizations*, IRS.Gov, www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations. See generally Terence Dougherty, *Section 501(c)(4) Advocacy Organizations: Political Candidate-Related and Other Partisan Activities in Furtherance of the Social Welfare*, 36 SEATTLE U. L. REV. 1337 (2013).

³⁹ Rev. Rul. 81-95, 1981-1 C.B. 332. See also Ellen P. Aprill, *Political Speech of Noncharitable Exempt Organizations after Citizens United*, 10 ELECTION L.J. 363, 381 (2011).

⁴⁰ Dougherty, *supra* note 38, at 1339.

their annual tax filings, contributors to such entities are not made publicly available.⁴¹

The relevant campaign finance statutes do not distinguish between for-profit and non-profit entities. But they limit meaningful disclosure in two distinct ways. As to any entity that makes an “independent expenditure” of over \$250 per year, the law requires the filing of certain reports with the FEC. But, though federal statutes contain arguably conflicting directives about what those reports must contain,⁴² the FEC has determined that independent spenders must report the identity of contributors *only* for contributions “made for the purpose of furthering the reported independent expenditure.”⁴³ Since most contributors do not earmark their contributions in any way, under this interpretation there is essentially no disclosure of contributor identity.

Similarly, in the case of “electioneering”—ads that name a candidate without expressly urging any action, like a vote for or against that candidate—federal law would *seem* to require full disclosure of expenditures and contributors above a certain level. A federal statute requires entities that spend over \$10,000 per year to disclose “names and addresses of all contributors who contributed an aggregate amount of \$1,000 or more to the person making the disbursement” during the election cycle.⁴⁴ But an FEC regulation limits such disclosure, like independent expenditure disclosure, to contributions made “for the purpose of furthering electioneering communications,”⁴⁵ so such contributors also typically go undisclosed.

So the IRS permits tax-exempt organizations to engage in campaign-related activity; and the FEC requires the disclosure of contributors only where the contributions are specifically earmarked for political activity (and they rarely are). All of this means that a great deal of outside money is subject to no real transparency at all. According to one study, “Dark money ads amounted to nearly 14 percent of all ads aired in the 2012 cycle, and 47 percent of all interest group ads.”⁴⁶

The term “gray money” is typically used to refer to the activities of groups known as “Super PACs.” These entities cropped up in the wake of the

⁴¹ The IRS Form 990 requires the inclusion of contributors above \$5,000, but such contributors are not subject to public disclosure. See *Instructions for Form 990 Return of Organization Exempt From Income Tax*, IRS.GOV, www.irs.gov/pub/irs-pdf/i990.pdf; see also Aprill, *supra* note 39.

⁴² Compare 52 U.S.C. § 30104(c)(1) to 52 U.S.C. § 30104(c)(2)(C).

⁴³ 11 C.F.R. § 109.10(e)(1)(vi).

⁴⁴ 52 U.S.C. § 30104(f).

⁴⁵ 11 C.F.R. § 104.20(c)(9). See also *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016).

⁴⁶ Travis N. Ridout, Michael M. Franz & Erika Franklin Fowler, *Sponsorship, Disclosure, and Donors: Limiting the Impact of Outside Group Ads*, 68 POL. RES. Q. 154, 156 (2015).

decision of the U.S. Court of Appeals for the D.C. Circuit in *SpeechNow.org v. Federal Election Commission*, which read the logic of *Citizens United* as condemning limits on contributions to political committees that make exclusively independent expenditures.⁴⁷ Super PACs, though they can accept unlimited contributions under *SpeechNow*, are still PACs, which means they are required to provide detailed information to the FEC (in contrast to the nonprofits described in the preceding section). But, importantly, the donors whose identities they are required to report are often other entities—including 501(c)(4) organizations, which can give to PACs and then shield their own donors as described above. So Super PAC disclosure, though in theory quite robust, frequently provides little meaningful information about the sources of PAC funds.

2. Hard Money: Flaws and Limitations

So the under-inclusiveness of our system of disclosure is one major problem. But even money that *is* subject to disclosure—the “hard money” spent by campaigns, parties, and regular PACs—suffers from flaws when it comes to the collection of meaningful, high-value information of the sort voters need if disclosure is to achieve the objectives the Supreme Court has identified.

Federal law requires campaigns and committees to provide the FEC with the first and last name, occupation, employer, and address of any individual who makes a contribution over \$200. Despite this requirement, FEC records reflect a number of problems, which sociologist Jennifer Heerwig has grouped into three categories: selective compliance (donors who comply with some but not all disclosure requirements—that is, leaving particular fields blank); the provision of information that is vague (providing one’s occupation as “self-employed,” say, or “slumlord”⁴⁸), and dissimulation (supplying information that masks one’s true identity or interests).⁴⁹ Perhaps more important, under the current disclosure regime it is extraordinarily time-consuming to track the activity of particular donors across elections and over periods of time. All of this means that FEC records are often far less informative than they might be.

⁴⁷ 599 F.3d 686, 689 (D.C. Cir. 2010).

⁴⁸ See Eric Lichtblau, *White Supremacist Who Influenced Charleston Suspect Donated to 2016 G.O.P. Campaigns*, N.Y. TIMES (June 22, 2015), www.nytimes.com/2015/06/22/us/campaign-donations-linked-to-white-supremacist.html.

⁴⁹ Jennifer Heerwig, *Diagnosing Disclosure: A Social Scientific Perspective on the Disclosure Debate*, 34 YALE L. & POL’Y REV. INTER ALIA 8, 10 (2016).

3. Accessibility and Impact

To be sure, developments in technology have made information about hard money more accessible than ever before. While FEC files once needed to be reviewed in hard copy, they are now available for anyone with an internet connection (though subject to some of the limitations identified above). Interested members of the electorate can now use the FEC's website to access information about contributions made by specific individuals, as well as to view graphics containing information about both congressional and presidential races. But as a general matter, the data is not presented by the FEC in a fashion that facilitates its use by ordinary voters.

C. Empirical Research

For many years, disclosure debates unfolded without the benefit of much research on either the costs or the benefits of disclosure.⁵⁰ Social scientists have begun to remedy that state of affairs, though much work remains to be done. This part briefly walks through what the data show with respect to both the costs and benefits of disclosure.

1. Quantifying Benefits

Research on the informational benefits of campaign finance disclosure remains limited, but several studies stand out.⁵¹ First, a classic political science text by Arthur Lupia assessed the impact of disclosure on voters in a California ballot initiative.⁵² On the ballot were five distinct propositions, all related to car insurance.⁵³ Three separate interest groups—the insurance industry, trial

⁵⁰ John C. Fortier & Michael J. Malbin, *An Agenda for Future Research on Money in Politics in the United States*, 11 THE FORUM 455, 473 (2013) ("Current research on disclosure is fairly sparse, pointing to contrary results."). Cf. Daniel P. Tokaji & Renata E. B. Strause, *How Sausage Is Made: A Research Agenda for Campaign Finance and Lobbying*, 164 U. PA. L. REV. ONLINE 223, 228 (2016) ("Advocates of reform should ... set aside the theoretical debate in order to engage in an empirical assessment of the effects that present-day independent spending is actually having on elections and governance.").

⁵¹ I should note that the other interest courts have credited in the disclosure realm—preventing corruption and the appearance of corruption—remains essentially untested as an empirical matter. Cf. DANIEL P. TOKAJI & RENATA E. B. STRAUSE, *THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS* (2014) (reporting the results of several months of interviews with members of Congress, candidates, and staff members, regarding the impact of outside spending on campaigns and governance).

⁵² Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994).

⁵³ *Id.* at 64.

lawyers, and consumer groups—had weighed in to either support or to oppose various propositions. The study found that where voters could identify the interest group backing a particular proposition, even poorly informed voters were able to mirror the decision-making processes of their more well-informed peers.⁵⁴ This means, the author concluded, that, at least in the ballot-initiative context, information about the sources of support may provide voters with valuable data they can then use to cast better-informed votes.⁵⁵

More recently, findings from a 2013 experimental study by political scientist Michael Sances suggest that disclosure about political money can supply voters with a useful guide to candidate ideology.⁵⁶ Participants in Sances' study were shown an edited political ad in support of a candidate. The ad discussed job creation, typically a non-partisan issue, and made no mention of political party.⁵⁷ Some participants were also shown a disclaimer indicating that a fictional organization, "Americans for Change," was responsible for the advertisement.⁵⁸ Two groups were also shown text that purported to list the top contributors to "Americans for Change": one, the "Labor Disclosure" group, was shown a list of five labor unions; the other, the "Business Disclosure" group, was shown a list of five corporations.⁵⁹ Participants were then asked how likely they were to vote for the candidate. Compared to subjects who were not provided disclosures listing the top contributors to the fictional organization, Republican subjects were significantly less likely to register support for the candidate when shown the labor contributors; Democratic subjects were less likely to indicate support for the candidate when informed that the top contributors were corporations.⁶⁰

In another recent piece, Conor Dowling and Amber Wichowsky similarly attempted to test the effects of disclosure by assessing whether, and how, disclosing the funders of political messages might impact the effectiveness of those messages (here, negative or "attack" ads). In one experiment, the authors found that where participants were shown an attack ad alone, that ad tended to erode support for the candidate being attacked; *but* where participants were also provided with information about the donors to the entity responsible for the ad—in this instance the group American Crossroads—the disclosure

⁵⁴ *Id.* at 72.

⁵⁵ *Id.*

⁵⁶ Michael W. Sances, *Is Money in Politics Harming Trust in Government? Evidence From Two Survey Experiments*, 12 *ELECTION L.J.* 53, 54 (2013).

⁵⁷ *Id.* at 56.

⁵⁸ *Id.* at 56.

⁵⁹ *Id.* at 56–57.

⁶⁰ *Id.* at 57–59.

moved “aggregate opinion roughly back to where it would have been had participants not watched the ad in the first place.”⁶¹ Those findings were confirmed by another, similar study by Travis Ridout, Michael Franz and Erika Fowler; though its findings were more complex, the authors concluded that information about the contributors to the group responsible for an attack ad had, in some cases, a significant impact on the perceived credibility of the ad, and thus its effectiveness.⁶² And a recent piece by Abby Wood suggests that the informational benefits of disclosure may include supplying voters with high-value information about candidate positions on transparency itself.⁶³

Taken together, these pieces suggest that individuals *do* utilize information about the sources of support in elections (whether candidate elections or ballot initiatives). But it is clear, from these studies and others, that the form in which the information is presented is of paramount importance. For example, another finding of the Dowling and Wichowsky study discussed above is that where individuals learned about the supporters of particular ads by reading news accounts, rather than via some other mechanism, that information had no impact on viewers’ reactions to the ad.⁶⁴ This is consistent with a finding by David Primo—that mock newspaper articles containing disclosure information had no statistically significant impact on voters’ ability to identify the positions of interest groups on a ballot issue.⁶⁵

2. Evaluating Costs

So disclosure does appear, from the limited empirical work on the topic, to provide voters with informational benefits (though the form of disclosure matters). But what about the other side of the equation? Does disclosure

⁶¹ Conor M. Dowling & Amber Wichowsky, *Does It Matter Who’s Behind the Curtain? Anonymity in Political Advertising and the Effects of Campaign Finance Disclosure*, 41 AM. POL. RES. 965, 978 (2013).

⁶² Ridout et al., *supra* note 46. The impact of the particular disclosure varied significantly—information that an unknown entity was responsible for an attack ad made the ad more effective than it would have been had the opposing candidate been responsible, but information that even a small grass-roots group was responsible for the ad made the ad *less* credible than if there had been no disclosure at all.

⁶³ Abby K. Wood, *Campaign Finance Disclosure and Voter Competence*, Working Paper (on file with author).

⁶⁴ Dowling & Wichowsky, *supra* note 62, at 981 (“[W]hile identifying the top five donors in a table format resulted in participants being more supportive of the attacked candidate compared to only viewing the ad, we find no statistically significant evidence that reading a news article discussing the donors to American Crossroads moved opinion”).

⁶⁵ David M. Primo, *Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge*, 12 ELECTION L.J. 112, 114, 126–27 (2013).

impose serious costs—in particular, does it deter individuals from giving political money, as some have assumed?⁶⁶ To date, there is no real support for the proposition that disclosure acts as a *major* deterrent to political contributions, though some scholarship confirms the hypothesis that mandatory disclosure will have at least some deterrent effect.

Political scientist Ray La Raja, noting that we currently lack both “a theoretical framework and empirical research”⁶⁷ for evaluating the costs and benefits of disclosure, recently reported the findings of an experimental study designed to determine whether potential donors were deterred from giving by the prospect of publicity.⁶⁸ His results were mixed: although the prospect of public disclosure had little to no impact on would-be donors’ willingness to make contributions,⁶⁹ information about specific thresholds above which contributions would be publicized *did* result in smaller overall contributions.⁷⁰ And, significantly, individuals who faced “strong interpersonal cross-pressures from people around them”⁷¹—that is, those who reported that they were not surrounded by like-minded individuals—were found to be “most likely to stop giving or donate at considerably smaller amounts to avoid the threshold amount,”⁷² likely because they feared the social or other costs that might result from revealing their political preferences.

An even more recent piece by Abby Wood and Douglas Spencer relied on reported state-level contribution data across states that both did and did not expand state-level disclosure requirements over the period of the study. Wood and Spencer found that contributors were “only slightly less likely to contribute in future elections in states that increase the public visibility of campaign contributions, relative to contributors in states that do not change their disclosure laws or practices over the same time period,” and noted that for the most part these changes in contribution behavior were negligible.⁷³

⁶⁶ See, e.g., *Van Hollen v. FEC*, 811 F.3d 486, 488 (D.C. Cir. 2016) (“Disclosure chills speech”); Michael Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. 1847, 1849 (2013) (arguing that in addition to its informational benefits, disclosure can actually “chill speech”).

⁶⁷ Ray J. La Raja, *Political Participation and Civic Courage: The Negative Effect of Transparency on Making Small Campaign Contributions*, 36 POL. BEHAV. 753, 754 (2014).

⁶⁸ *Id.* at 755.

⁶⁹ *Id.* at 762.

⁷⁰ *Id.* at 768.

⁷¹ *Id.* at 770.

⁷² *Id.* at 770.

⁷³ Abby K. Wood & Douglas M. Spencer, *In the Shadows of Sunlight: The Effects of Transparency on State Political Campaigns* 15 ELECTION L.J. 302, 311 (2016) (estimating one “chilled” donor per candidate).

Beyond this scholarly work, both case law and the popular press make clear that the targeting of individuals for harassment or retaliation based on disclosure of political contributions does occur. In *Brown v. Socialist Workers '74 Campaign Committee*,⁷⁴ the Court sustained a minor party's as-applied challenge to compelled disclosure, citing "numerous instances of recent harassment" by both private parties and the government.⁷⁵ More recently, in the course of considering a challenge to the broadcasting of the trial over California's Proposition 8, the 2008 ballot initiative in which California voters amended their state's constitution to recognize "only marriage between a man and a woman," the Court noted allegations of harassment, including death threats and vandalism, against Proposition 8's supporters.⁷⁶ And press accounts suggest that Mozilla CEO Brendan Eich resigned after his financial support for Proposition 8 was made public.⁷⁷ But neither the prevalence of this sort of activity, nor its impact on the behavior of active or prospective donors, is yet clear.

III. MAKING DISCLOSURE WORK

The preceding sections surveyed the current disclosure landscape. In this section, I make a number of recommendations, ranging from the practical to the theoretical, for improving this important and underappreciated element of our system of campaign finance regulation. I am guided in this effort by a succinct summation offered by Michael Malbin and Thomas Gais two decades ago. Campaign finance disclosure can only work, they wrote, if: "(1) Most candidates and political organizations report what they do accurately; (2) Such reports in fact comprise most of the activities and relationships of importance to voters; (3) The reports are available in a useful format, and at an accessible location; (4) Interested, knowledgeable people read and interpret the reports and then make useful information available in a timely way to voters; (5) Voters are able and willing to use the information as a basis for making an election decision."⁷⁸ The recommendations offered below would bring us significantly closer to achieving these objectives.

⁷⁴ 459 U.S. 87 (1982).

⁷⁵ *Id.* at 100–1.

⁷⁶ *Hollingsworth v. Perry*, 130 S. Ct. 705, 707 (2010) (per curiam).

⁷⁷ Alistair Barr, *Mozilla CEO Brendan Eich Steps Down: Attention Focused on his Support of Anti-Gay Marriage Ballot Proposal*, WALL ST. J. (Apr. 3, 2014).

⁷⁸ MICHAEL MALBIN & THOMAS L. GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE STATES* 36 (1998).

A. Expanding Disclosure

One obvious gap in the current system is the amount of political money that is currently not subject to meaningful disclosure. Several fixes are possible here. First, the IRS could limit the ability of social welfare organizations to engage in political activity. Even if it did not ban such activity outright, as it does with 501(c)(3) charitable organizations,⁷⁹ it might impose a much stricter limit than it currently allows; Ellen Aprill has suggested that such organizations might appropriately be limited to devoting 10–15 percent of their total activities to politicking rather than the *de facto* 50 percent ceiling that is currently in effect.⁸⁰ Alternatively, it could make public the information it already collects from social welfare organization via IRS Form 990; since those entities are already required to report contributions above \$5,000, it would be a simple fix to make such information publicly available.⁸¹

But a far better solution would be to bring all entities that engage in election-related spending under the same disclosure regime—and, short of the creation of a new entity, the best organization to oversee all disclosure would be the FEC. One way to achieve this would be to expand the definition of a PAC in order to sweep in all entities that engage in campaign spending. This could be challenging: notwithstanding the Supreme Court's general approval of disclosure, the Court has evidenced some concern about what it perceives as the burdens posed by the requirements of the PAC form. Justice Kennedy's majority opinion in *Citizens United*, in rejecting the argument that the option to speak through a PAC mitigated any constitutional concerns about the corporate speech limitation, wrote that "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations."⁸² But, critically, that statement was made in the context of a discussion that was predicated on the existence of meaningful disclosure by non-PAC entities. In light of the obvious shortcomings of that assumption,

⁷⁹ In theory, the IRS could go further by simply aligning the standards of the tax exempt organizations that currently engage in political activity with 501(c)(3)s—in other words, by prohibiting social welfare organizations from engaging in any political activity at all. The Court explained in *Regan v. Taxation without Representation*, 461 U.S. 540, 545–46 (1983), that the government has no obligation to subsidize political activities, like lobbying, by nonprofit organizations. But in the post-*Citizens United* era, it is not clear that a categorical ban of this sort would pass constitutional muster. See Brian Galle, *Charities in Politics: A Reappraisal*, 54 WM. & MARY L. REV. 1561 (2013).

⁸⁰ Aprill, *supra* note 39, at 382.

⁸¹ Such information already appears on Schedule B of IRS Form 990. See *id.* at 403–4 & n. 327.

⁸² *Citizens United v. FEC*, 558 U.S. 310, 337 (2010).

the Court could well come to a different conclusion about the permissibility of imposing PAC-like requirements on all independent campaign spenders.⁸³

Three other possibilities bear mentioning. First, a movement has cropped up in recent years to use the Securities and Exchange Commission to require public companies to provide shareholders with information about campaign spending.⁸⁴ Second, at least one academic proposal suggests that the Federal Communications Commission could use existing authorities to require independent spenders to engage in disclosure as a condition of the purchase of advertising airtime.⁸⁵ Third, state nonprofit law may be another site of possible reform, and states like California have already begun requiring nonprofits that engage in political activity to provide the state with information about the sources of their contributions.⁸⁶ But these proposals, though constructive, are limited in scope; they would also result in the addition of new government entities as well as new sites of information to the regulatory mix.

B. Improving Disclosure

Several simple fixes to our hard-money system could significantly improve the quality of campaign-finance data on what is still the most important source of money in federal elections.⁸⁷ First, the use of standardized forms at the FEC, perhaps with drop-down menus of the sort used in the Census long form, would facilitate the provision of more useful information, and eliminate the prospect of evasive or non-responsive answers. Second, donors should be given unique ID numbers, which would facilitate identification—by scholars, journalists, and interested and engaged voters—of the largest and most significant donors.

⁸³ Cf. Marcia Coyle, *Justice Anthony Kennedy Loathes the Term Swing Vote*, NAT'L L.J. (Oct. 27, 2015), www.nationallawjournal.com/id=1202740827841/Justice-Anthony-Kennedy-Loathes-the-Term-Swing-Vote?slreturn=20160905224907.

⁸⁴ Lucian A. Bebchuk & Robert J. Jackson, *Shining Light on Corporate Political Spending*, 101 GEO L.J. 923, 925 (2013) (arguing that “the SEC should develop rules requiring public companies to disclose political spending to shareholders”).

⁸⁵ Lili Levi, *Plan B for Campaign-Finance Reform: Can the FCC Help Save American Politics After Citizens United?*, 61 CATH. U. L. REV. 97, 101 (2011) (arguing that the FCC can use existing authority “to require third-party purchasers of airtime for political and advocacy advertising to disclose their major direct and indirect funding sources and principal directors, officers, or operators”).

⁸⁶ See Linda Sugin, *Politics, Disclosure, and State Law Solutions for 501(c)(4) Organizations*, 91 CHI.-KENT. L. REV. 895 (2016).

⁸⁷ Jennifer Heerwig, *supra* note 49, at 10 (2016). See also RACES IN WHICH OUTSIDE SPENDING EXCEEDS CANDIDATE SPENDING, 2014 ELECTION CYCLE, CENTER FOR RESPONSIVE POLITICS, www.opensecrets.org/outsidespending/outscand.php?cycle=2014 (showing that in the 2014 congressional campaigns, outside groups outspent candidates in 28 races, but that candidates spent more in the remaining 443).

These two simple fixes would considerably improve the quality of data the FEC collects and maintains.

C. Delivering Disclosure

The FEC has made significant strides in making its data publicly available in recent years, including the very recent launch of a more interactive web portal. But a still more effective disclosure regime would allow voters to use the FEC's website to explore the vectors of political influence—perhaps, for example, by showing voters how much money a particular official has received from high-dollar contributors, or the industries or sectors from which most donations to a particular candidate come.

Even a vastly improved FEC website, however, would have limited impact, as only a small subset of the electorate engages directly with such data. If disclosure is actually to impact the behavior of voters, it needs to be presented to voters at a time and in a format that could actually affect voting behavior. Although American citizens are not going to become perfectly informed voters anytime soon, individuals with limited information are certainly capable of making informed choices.⁸⁸ The challenge, then, is how best to provide voters with information that might empower and enable them to do that.

Archon Fung, Mary Graham, and David Weil, the authors of the seminal text *Full Disclosure: The Perils and Promise of Transparency*,⁸⁹ describe restaurant-hygiene disclosure as a paradigmatic example of successful disclosure. As they explain, hygiene grades (“A,” “B,” “C”), typically posted in restaurant windows, “have become highly embedded in customers’ ... decisional processes. A restaurant’s grade is available *when* users need it ... *where* they need it ... and in a *format* that makes complex information quickly comprehensible.”⁹⁰

How, then, to deliver campaign finance information to voters in a way that mirrors what is so effective about restaurant sanitation grades? Disclaimers,

⁸⁸ See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 296 (2005) (“No voter needs to acquire all available information to competently make a reasoned decision. Instead, she can rely on particular pieces of information, connected non-accidentally to accurate conclusions about the consequences of her vote, and still vote competently.”)

⁸⁹ ARCHON FUNG, MARY GRAHAM & DAVID WEIL, *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* (2007). Specifically, they write, “Successful policies focus first on the needs and interests of information users, as well as their abilities to comprehend the information provided by the system.... They seek to embed new facts in the decision-making routines of information users and to embed user responses in the decision making of disclosers,” *Id.* at 11.

⁹⁰ *Id.* at 83.

which appear as part of political advertisements, are one obvious site of potential reform. At present, a provision of federal law upheld in *Citizens United* requires independent spenders to include in their ads disclaimers that read “___ is responsible for the content of this advertising,” both spoken and displayed on the screen for at least four seconds.⁹¹ (Candidates’ own ads are subject to similar requirements.⁹²) But because such entities typically use names that are benign, patriotic-sounding, and generally uninformative,⁹³ the disclosed information does not ordinarily communicate much of value.

Justin Levitt has proposed the creation of a “Democracy Facts” label to appear within campaign communications, “emphasizing simple proxies for the quantity and fervor of local support for a particular communication,” including the number of supporters in a given jurisdiction, as well as the percentage of support supplied by top donors.⁹⁴ This sort of detail could make disclaimers more genuinely informative. Another possibility would be to require organizations to craft a mission or policy statement for inclusion in their disclaimers. As research like the Lupia study described above shows, information about the supporters of particular causes and messages *can* equip voters to make choices that better align with their preferences. Of course, choosing between two or more candidates is quite distinct from the decision about where to eat dinner. But the general point—that information should be delivered near in time to voting and in an accessible format—seems entirely applicable.

D. Testing and Theorizing Disclosure

Another important task is more academic: the need to engage in additional empirical research on how best to design and deliver disclosure, and, relatedly, to develop a more fully realized set of arguments that emphasize the constitutional values advanced by disclosure. As a number of scholars have noted,⁹⁵ in the post-*Citizens United* era, opponents of campaign finance regulation have begun to focus on challenging the premises of disclosure

⁹¹ 2 U.S.C. § 441d(d)(1)(B) (2002).

⁹² *Citizens United*, 530 F. Supp. 2d at 280 (citing 2 U.S.C. § 441d(a)(3) (2002)). The law also requires the sponsors of ads to provide in the disclaimers identifying information that includes the name, address, and phone number or website of the sponsor.

⁹³ Heerwig & Shaw, *supra* note 2, at 1496.

⁹⁴ Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL’Y REV. 217, 227–28 (2010). For a visual representation of Levitt’s “Democracy Facts,” see <http://electionlawblog.org/archives/DemocracyFacts.html>.

⁹⁵ Michael Kang, *Campaign Disclosure in Direct Democracy*, 97 MINN. L. REV. 1700, 1700 (2013) (“[C]ampaign disclosure laws now are under legal and political attack as never before.”).

laws;⁹⁶ meanwhile, the affirmative case for disclosure has lagged behind. Establishing a solid theoretical and empirical framework is critical both to designing better disclosure and to successfully defending disclosure against attack.⁹⁷

E. Taking Privacy Seriously

Finally, any attempts to improve disclosure along the lines described above should take seriously the privacy concerns disclosure implicates.⁹⁸ One way to address privacy concerns is to explore partially de-identifying campaign finance data before public release. Bruce Cain has written in favor of what he calls “semi-disclosure”;⁹⁹ noting that the government already employs a kind of semi-disclosure in the case of the census, aggregating identifying information to avoid revealing sensitive personal details, he suggests that we ought to do the same with campaign finance data. This insight has a definite appeal; at the very least, in the internet age, the benefits of requiring donors to supply a physical address seems outweighed by the potential privacy threats represented by the availability of such information online. One additional possibility is the creation of a tiered system in which data about small donors are available only in the aggregate, while the identity of donors above a certain threshold, which is of additional informational value, would be revealed.¹⁰⁰

IV. CONCLUSION

For many years, disclosure has played a largely ancillary role in debates about money in politics. But any serious reform proposal today should include disclosure—both because it has genuine potential for improving our democracy, and because a functioning system of disclosure may well be a necessary predicate to building the case for other sorts of substantive campaign finance reform.

⁹⁶ See, e.g., Bradley A. Smith, Scott Blackburn & Luke Wachob, *Compulsory Donor Disclosure: When Government Monitors its Citizens*, www.heritage.org/research/reports/2015/11/compulsory-donor-disclosure-when-government-monitors-its-citizens; Cleta Mitchell, *Donor Disclosure: Undermining the First Amendment*, 96 MINN. L. REV. 1755, 1759 (2012) (“Disclosure is the next frontier for those of us who toil in these vineyards—it will constitute the next wave of legal jurisprudence in the campaign finance arena. In the same way litigants challenged these substantive prohibitions on certain kinds of speech, over time we have to make the case and build a record about the threat posed by disclosure.”).

⁹⁷ Abby Wood has compiled an excellent list of possible directions for future empirical work. See Wood, *supra* note 63, at 14–15.

⁹⁸ See *McIntyre v. Ohio Election Comm’n*, 514 U.S. 334 (1995) (holding that Ohio prohibition on anonymous pamphleteering fails to satisfy exacting scrutiny).

⁹⁹ Bruce Cain, *Shade from the Glare: The Case for Semi-Disclosure*, CATO UNBOUND (Nov. 8, 2010), www.cato-unbound.org/2010/11/08/bruce-cain/shade-glare-case-semi-disclosure.

¹⁰⁰ Heerwig & Shaw, *supra* note 2, at 1494.